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FILED
MAY 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-1132

IN THE SUPREME COURT OF THE UNITED STATES

Tammy Adkins, et al.,

Petitioners,

v.

Robert M. Gates,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR GI-JANES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Is the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, unconstitutional, inasmuch as the statute (a) was retroactively applied to those service members who entered the armed forces prior to its enactment; (b) invidiously discriminates between male and female veterans and their former spouses; (c) contains garnishment mechanisms that do not afford sufficient procedural due process to veterans; and (d) has provisions that permit divorce courts of different jurisdictions to treat veterans disparately?

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INTEREST OF AMICUS CURIAE[1]

The GI-JANES (Get Involved – Join Against Never-ending Ex-spouse Support) is an organization composed of women dedicated to the revocation of the Uniformed Services Former Spouses Protection Act of 1982 (10 U.S.C. § 1408). The group consists mainly of female active duty, reserve, and retired service members of the Army, Navy, Air Force, Marine Corps and Coast Guard who are either divorced or in the process of a divorce and are affected by this statute. Other members include women, who are ex-spouses, entitled to a portion of the retired pay of a former military spouse but who have waived such a payment on moral grounds. Also, included are "second wives" – those women married to active military personnel or military retirees who are denied the benefits of being a part of the military family that are available to a "first" wife.

The members of the Armed Services of the United States are honored to serve the nation. As a result of such service, they endure years of hardship, often involving deployment to remote locations separated from the comforts of home, friends and family. These places may be austere, temporary locations with the daily threat of enemy attack. A compelling motivation during such times is the promise that at the end of that service, they will have the opportunity to continue to serve the nation as members of the retired reserve, waiting to be called again in defense of America, but with the opportunity to pursue their

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[1] Counsel for amicus curiae authored this brief in whole and no other person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

personal dreams as had necessarily been put on hold to serve.

Service members are all volunteers who serve in various locations around the world, both overseas and within the borders of the United States, as the needs of Armed Services dictate. As such, members do not ultimately control where they are assigned, but may be sent involuntarily to various states and nations. Therefore, service members depend upon the federal government to protect them from inappropriate, arbitrary and inconsistent use of powers by the states and nations. Since only approximately 1% of the population serves in the military, when discriminated against these citizens have no strength in numbers to have enough political clout to protect themselves. Although in federal service, service members still desire to exercise their rights as members of society to drive automobiles, vote in federal elections, and marry—all actions that fall primarily to the states under the American system of government—but in which the federal government has a vested interest and Constitutional obligation to protect service members.

The American Armed Forces are one of the greatest equalizers, with equal opportunity assured for all based on law, custom and practice. As a result, the Armed Forces continue to attract volunteers of all races, heritage, and gender. The special opportunity for female service members to be mothers as well as soldiers, sailors, marines, airmen and coastguardsmen is perhaps the most salient example of the commitment of the Armed Forces to equal opportunity.

All citizens of the United States must be citizens of a state to be full members of American society. Service members are no exception. However, as a result of actions taken in furtherance of federal service, they can be subject to the jurisdiction of courts of states other than those of their legal residence. A central premise to the concept of a federal military

is that there cannot be significant differences in the treatment of service members between states in matters that interfere with the concept of federal control of the military.

This Court recognized the strong federal interests in the military retirement system in its decision of McCarty v. McCarty, 453 U.S. 210 (1981), holding that the military retirement pay could not be divided by state courts. In response, Congress passed the Uniformed Services Former Spouses Protection Act (USFSPA), retroactive to the McCarty decision, to allow state courts to divide the military retirement/retainer pay in a divorce. This case challenges the USFSPA as not providing sufficient protection for service members, and particularly female service members, in the event of a divorce.

Amicus GI-JANES accepts the factual basis in the appellant's petition and hereby incorporate these facts by reference. Both parties have consented to submission of this brief.

REASONS FOR GRANTING THE PETITION

SUMMARY OF THE ARGUMENT

This Court has, over the years, helped shape the characterization of the military retirement system. There can be no doubt as to the substantial federal interest in the fairness and operation of the military retirement system. Therefore, when federal legislation allows state courts to divide military retirement pay during a divorce, but does not ensure that the federal interests and Constitutional rights of the service members are properly protected, such legislation must fail.

ARGUMENT

A. The USFSPA Has Had A Disparate Impact on Female Service Members In That It Provides No Enforcement Mechanism for Service Members Who Are Custodial Mothers.

The USFSPA is biased against service members in the enforcement of child support and support for spousal abuse. Additionally, the fact that these constitutionally-fatal flaws affect female service members more often than males should result in the Court's review of this case.

USFSPA specifies that the service member may have a maximum of 65% of retired pay distributed directly by the military finance center to a former spouse through a combination of division of retired pay and child support. 10 U.S.C. § 1408e(4)(B). However, there is no provision for the former spouse's share to be reduced by child support, so the service member is forced to seek enforcement through other means. This discriminates against service members in favor of the former spouses in general, and since mothers consistently receive custody of children in a divorce at a higher rate than fathers, *See* Thomas R. Trenkner, J.D., Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3d 262 (2007), female military members are disparately burdened by this discrepancy.

The second area of discrimination is even more disturbing. Since passage of the National Defense Authorization Act for Fiscal Year 1993[2], the entitlement to a portion of the retirement/retainer pay of a former spouse abused by a servicemember is protected. 10 U.S.C. § 1408(h).

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[2] Pub. L. 102-484, 106 Stat. 2426

However, the reverse is not true; when state courts can and do award a portion of the retirement/retainer pay to the abusive former spouse, this only intensifies and prolongs the agony of the abused service member. Since abuse victims are predominately women, National Coalition Against Domestic Violence, *Domestic Violence Facts*, *at* http://www.ncadv.org/files/DV_Facts.pdf, this discriminatory treatment harms service members in general and therefore also has a disparate impact on women.

Since both these discriminatory omissions have no discernable or logical rational basis, the discrimination is unconstitutional, without even considering the higher intermediate standard that should be applied to the disparate impact on women.

B. The Societal Circumstances That Created the Basis for the USFSPA No Longer Exist.

The USFSPA was enacted in response to this Court's decision in *McCarty*. The language indicates that wives of military men were the target group for protection since the expectation was that they, especially at senior levels, were to support their husband's career, often at the expense of their own. *See* S. REP. NO. 97-502 (1982) as reprinted in 1982 U.S.C.C.A.N. 1596. However, there has been a drastic shift in this norm in two respects: the support for careers of military spouses and the advent of women in the Armed Forces.

The USFSPA was designed to remedy the situation of a former spouse who had sacrificed her career for that of her husband under the assumption that the military required the spouse to support the military member's career. This situation was recognized and remedied by Congress in the Defense

Authorization Act for Fiscal Years 1988 and 1989.[3] As a result, the right of military spouses to have careers was established as Department of Defense policy. Department of Defense Directive 1400.33, Employment and Volunteer Work of Spouses of Military Personnel, Feb. 10, 1988. However, this document was suspended in a routine revision of directives because it was obsolete, Removal of Obsolete Regulations, 71 Fed. Red. 49348, Aug. 23, 2006, indicating the changing attitudes towards working spouses. Although hearings prior to passage of the USFSPA included comments on officer evaluations regarding comments about the wife's support of the military man's career, such comments are prohibited by the Armed Forces (see, e.g. Air Force Instruction 36-2406, Officer and Enlisted Evaluation Systems, 15 April 2005), and have been since 1988, so no longer can the wife's support be regarded as directly supporting or hindering the military man's career. At the present time, it is estimated that 70% of military spouses work, OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR PERSONNEL AND READINESS, MILITARY PERSONNEL HUMAN RESOURCES STRATEGIC PLAN (CHANGE 1) (2002), in contrast to the original 1982 testimony before Congress portraying the typical spouse at that time as a nonworking wife who devoted her full time to her husband and family. MARSHA L. THOLE & FRANK W. AULT, DIVORCE AND THE MILITARY II: A COMPREHENSIVE GUIDE FOR SERVICE MEMBERS, SPOUSES, AND ATTORNEYS (1998). So the need for such special protection no longer exists.

In addition to the shift from non-working to working spouses, the demographics of the Armed Forces have changed as well. This change was already taking shape at the time

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[3] Pub. L. 100-180, Sec 637

USFSPA was passed by Congress. The numbers of women on active duty in the Armed Forces was already on the rise and had risen from 1.6% in 1973 to just less than 9% by 1982. Additionally, 1980 was historic in that it was the first year that women graduated from all four of the Service Academies. As a result, today women compose 11.5-12% of senior officers at the rank of colonel/captain (grade of 06) in the Army, Air Force and Navy in contrast to composing less than 2% of that rank for all Services in the early 1980's. Similar such increases have occurred since 1982 in the senior enlisted ranks of E7-E9 for all of the Services. Today, women compose approximately 17 % of the Armed Forces, with the Army, Air Force and Navy Reserves each composed of over 20% of women. LORY MANNING, WOMEN'S RESEARCH & EDUCATION INSTITUTE, WOMEN IN THE MILITARY; WHERE THEY STAND (5th ed. 2005). As such, historic assumptions about divorce for the protection of women are not only constitutionally suspect but also inaccurate. Military marriages today include substantial numbers of female service members married to civilian males. Divorce results in many of these military women being forced to forfeit large portions of their retirement pay for the rest of their lives to ex-husbands who have successful careers and often are earning substantially more than the these women are earning.

Since the USFSPA reflects historical assumptions that do not hold true today, the law—as the only federal divorce law in existence--is an anachronism that is not reflective of a society evolving to show greater opportunity for women. Therefore, the USFSPA as written disparately restricts the rights of service women and should be reviewed by the Court.

C. It Is Essential To The Constitutional Concept Of Common Defense That Service Members Be Treated Equally By State Courts.

One of the basic foundations of the Constitution is the need for a common defense. US Const. pmbl. This purpose carries through the provisions addressing defense in the powers of Congress. U.S. Const. art. I, § 8. Just as the Court has broadly applied the "time, manner, place" provisions of the Elections Clause in Section 4 of Article 1, *see e.g. Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002), the need for a "common" defense should be broadly applied to include a common application of the rules applicable to military personnel. This would be consistent with the application of other provisions in the same section where the Court and Congress have ensured uniform application through the U.S. for those provisions. For example, the rules for naturalization, copyrights, money, patents, and the post office, are all controlled by federal law (Titles 8, 17, 31, 35, and 39 of the U.S. Code, respectively) and the regulation of interstate commerce is the construction of the Courts. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984).

The current system for division of military retirement under the provisions of 10 U.S.C. § 1408 begs for such standardization. There are fifty different standards for dealing with military retirement / retainer pay. MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK 430 (2006). One particular area of uneven interpretation and application is with regards to the jurisdiction of state courts. With the advent of the current no-fault divorce system, subject matter jurisdiction for state courts vests in as little as six weeks. *See, e.g.* NEV. REV. STAT. § 125.020 (2006). In recognition of this fact, Congress stipulated that state court orders dividing military pay could only be

recognized if the court had jurisdiction over the service member either through residence, domicile or consent of the service member. 10 U.S.C. § 1408c(4). Although the criteria of domicile and residence have a solid history of application and acceptance, the criteria of consent of the service member has been subject to two schools of thought: (1) either consent must be specific to the division of military pay or (2) that any response to the suit subjects the military member to the court—even a suit where there would be lack of personal jurisdiction under this Court's sufficient contacts test. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). State courts have split on this question, finding both the former, *see, e.g. Flora v. Flora*, 603 A.2d 723 (R.I. 1992), and the latter, *see Seeley v. Seeley*, 690 S.W.2d 626 (Tx. Ct. App. 1985). This has been best phrased by a California judge in an unpublished opinion – "In order for a court to obtain jurisdiction to divide a pension by way of consent, it makes sense that such consent should be to the division itself, and not to some ancillary matter." *In re Stroup*, No.D030869, 2003 Cal. App Unpub. LEXIS 4687 at *4 (Cal. Ct. App. May 13, 2003). Such a major split in interpretation of this statute should be sufficient to compel review by this court.

There are two general aspects of the divorce case – the family issues and the property issues. With regards to the divorce issues, the no-fault system was designed to facilitate the resolution of family matters, and as a policy, to facilitate the resolution of issues relating to minor children. However, children issues are not permanent and can be adjusted to changing circumstances whereas property issues are resolved once and not addressed again. *See, e.g.* N.H. REV. STAT. ANN. Ch. 458.

As a result, there is both a public policy reason and a

philosophical reason to treat these differently. From a public policy point of view, it is desirable to simplify resolution of child support and child custody issues in order to mitigate the impact of divorce on any minor children. Therefore, participation of both parties is desirable. However, constitutional restrictions on state powers limit the ability of states to interfere with the rights of citizens of other states. *See* U.S. CONST. amend. XIV. It has been long recognized that out-of-state residents should have access to federal courts to ensure a fair hearing on issues in another state. *See* 16 JAMES WM. MOORE ET AL, MOORE'S FEDERAL PRACTICE §107.03 (3rd ed. 1997). Therefore, to ensure this type of fairness for service members within the reach of a state court due to their military service, this protection should be afforded to them as well.

It has also been long established by this court that state courts may be limited in their rulings in divorce proceedings. The concept of a "divisible divorce" recognizes that a court has only the power to divide the property under its control. *See Rice v. Rice*, 336 U.S. 674 (1949). The USFSPA did nothing to change this but in fact emphasized this fact by stressing the necessary jurisdiction, 10 U.S.C. § 1408c(4), but provides no enforcement mechanism to protect the rights of service members.

Since the passage of the USFSPA, Congress has acted to ensure the uniform rights and standards in traditional areas of state control that affect service members – driver's licenses, voting and marriage. For example, Congress has enacted the REAL ID Act of 2005[4] that set standards for state drivers' licenses, the Help America Vote Act of 2002[5] to ensure the voting rights of service members, and the Defense of Marriage

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[4] Pub. L. 109-13, 119 Stat 231

[5] Pub. L. 107-252, 116 Stat. 1666

Act[6] to provide uniformity in marriage across the fifty states. As such, Congress has signaled an intent that traditional areas of states rights are subject to federal standardization when substantial federal interests are involved. Disparities under the USFSPA contravene this recent trend.

If the lower court ruling stands, even the out-of-state military member or retiree will have to rely on the courts in the state where the spouse desires a divorce to balance these important state and federal concerns.

D. USFSPA Is No Longer Needed To Protect The Rights Of Former Spouses.

If this Court were to grant the petition and later strike down the USFSPA, states would still retain the ability to protect former spouses with a structure of alimony and divison of a pension-like system now. Unlike the divison of military pay which is for life, alimony is provided under state laws in limited circumstances and duration that emphasize equitability. Mei Fung Soo, J.D., Annotation, *Propriety of Equalizing Income of Spouses Through Alimony Awards*, 102 A.L.R.5th 395 (2007). The former spouse also retains any rights to Social Security provided under the military member's creditable work if the spouse would have a smaller claim based on her/his own work history. *See* 42 U.S.C. § 402(b). Since the USFSPA was enacted, Congress has allowed military members to participate in the federal Thrift Savings Program (TSP) that functions as a retirement plan. *See* 5 U.S.C. § 8432b. Unlike the military retirement/retainer pay, which is subject to very special considerations, *see* 10 U.S.C. § 1408(c)(2), TSP is similar to

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[6] Pub. L. 104-199, 110 Stat. 2419

other retirement plans that have a cash value that can be determined and divided by a state court so that the former spouse can be equitably compensated without the concerns raised by the Court in *McCarty* nor the special conditions recognized by Congress in the USFSPA.

Therefore, if the Court grants the petition, hears the case and strikes down the statute, former spouses will still have adequate protection through resources that would still be available for state court division and will not be "thrown to the wolves."

CONCLUSION

When Congress passed the USFSPA as a rejection of this Court's sound logic in the McCarty decision, they failed to provide adequate protection for service members operating under the U.S. Constitution, with a hugely disparate impact on female service members, especially those who are mothers. Therefore, in this light, the petition should be granted for a review of the USFSPA by the Court.

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